Supreme Court, U.S.
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Supreme Court of the United States

ALLAN GENE-REEDER MARTIN, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

No. _____

On Petition For Writ Of Certiorari To The Supreme Court Of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the failure to grant a new trial when new evidence was discovered denied Allan Martin, Jr., his constitutional right to a fair trial.

II. Whether Allan Martin, Jr., received ineffective assistance of counsel in violation of his federal constitutional rights.

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BASIS OF JURISDICTION

On April 30, 2001, the Michigan Supreme Court denied Defendant's application for leave to appeal. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of Defendant's application for leave to appeal to the Michigan Supreme Court, the court of last resort in Michigan.

OPINIONS AND ORDERS ENTERED BELOW

1. The Opinion of the Michigan Court of Appeals, affirming Martin's conviction was entered on September 29, 2000, is unreported, and appears in Appendix C.

2. The Order of the Michigan Court of Appeals denying Martin's motion for rehearing on grounds that the Court of Appeals committed palpable error in failing to rule on appellate counsel's request for an evidentiary hearing, was entered on November 21, 2000, and appears in Appendix B.

3. The Opinion of the Michigan Supreme Court denying Martin's application for leave to appeal was entered on April 30, 2001, is unreported, and appears in Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOVLED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Michigan Rules of Evidence 804(b)(3) and 803(24). The rules provide as follows:

> [804(b)(3):] **Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> [803(24):] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (24) **Other Exceptions**. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for

which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

A jury convicted Martin on April 10, 1997 of first-degree felony murder, for the killing of gun shop owner, Darrell Piedt in South Haven, MI. Judge David M. Peterson sentenced Martin on May 5, 1997 to life imprisonment without the possibility of parole. Martin timely filed a motion for a new trial, which the trial court denied on March 19, 1999. A timely Claim of Appeal was filed on April 7, 1999. On September 29, 2000, the Michigan Court of Appeals affirmed Martin's conviction. Martin then timely filed a motion for rehearing on October 20, 2000, on grounds that the Court of Appeals committed palpable error in failing to rule on appellate counsel's request for an evidentiary hearing. Defense counsel sought the hearing to elicit evidence on how being left-handed would affect the trajectory of a bullet. This motion was subsequently denied in an order of the Court of Appeals dated November 21, 2000. Martin then timely filed an application for leave to appeal before the Michigan Supreme Court. That application was denied on April 30, 2001.

Martin's appeals focused on three issues: newly discovered evidence, ineffective assistance of counsel, and failure of the trial court to order the prosecutor to grant immunity to co-defendant Michael Schramm. These claims were all presented in the motion for new trial and were addressed at the hearing on that motion (March 1, 1999 transcript, pp 120-131, 126-127, 128-130, 137-138). The trial court ruled on the motion and the matter was appealed to the court of last resort in Michigan, i.e., the Supreme Court, which refused to hear the appeal. (See Appendix A).

During opening statement of Martin's trial, defense counsel informed the jury that Martin would testify that he and Schramm went into Piedt's gun shop in order to price a gun and that Martin had taken his gun along to ask Piedt how to make it look shinier. Piedt told Martin he looked too young to have a gun. Defense counsel then told the jury that when Piedt appeared to be reaching for the phone to call the police,

Martin suddenly decided to shoot him.

Two men who had been in the store on the day Piedt was shot testified about seeing two young men in the gun shop. One of the men identified Martin as being in the store.

Crystal Fisher testified Martin told her that he and Schramm went to the gun shop and Schramm was supposed to steal a gun. According to Fisher, Martin shot Piedt in the head. Fisher also testified that Martin, Jeremy Buyce and many of her other acquaintances were members of a gang called The Gangster Disciples. Fisher denied she was a member of the gang but was associated with its members.

Police officers testified that Martin had confessed to the crime, but later recanted. In recanting, Martin told police he had not been at the gun shop; he said Schramm and Buyce gave him bullets and a handgun and told him to get rid of them. Martin explained he did not know who the real killer was because Schramm and Buyce took turns acting out the event, taking turns being the shooter. Martin told police it was his duty as a gang member to take the rap for the crime. An officer testified Martin helped locate the gun in a river.

On the second day of trial, Martin's father approached defense counsel with new information he had just received. Martin's father had learned that someone had used Martin's stolen driver's license for photo-identification to cash a forged check. Martin's driver's license was stolen shortly before Piedt's death. The driver's license was subsequently used to cash a stolen check while Martin was incarcerated. Trial counsel did not investigate or use this information in any way. After the trial was over, members of Martin's family began receiving threatening, anonymous packages and letters. These materials show that someone other than Martin had killed Piedt (See Appendix E).

Martin timely filed a motion for a new trial, based on the newly discovered evidence, ineffective assistance of counsel, and failure to grant immunity for co-defendant Schramm. Martin subsequently filed a motion for scientific evidence, which was granted in part and denied in part. Some testing

was done on copies of the anonymous letters, but the originals were not released to Martin. No DNA testing to detect saliva on the envelopes or stamps was performed.

At the hearing on Martin's motion for a new trial, Defense counsel testified that he and Martin had discussed the trial matters. Martin and his father testified how the defense counsel did not keep them informed about trial matters and how the defense counsel had not obtained Martin's permission to admit guilt to the jury or to have Martin testify. Martin's father testified he had never been informed his son might have to testify; the trial court found Martin's father to be credible. Nonetheless, the trial court denied Martin's motion for a new trial. See Appendix D.

REASONS FOR GRANTING THE WRIT

I. FAILURE TO GRANT A NEW TRIAL WHEN NEW EVIDENCE WAS DISCOVERED DENIED MARTIN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Rule 10 of the United States Supreme Court rules addresses considerations governing review on certiorari. The rule states:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court,

or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Martin will demonstrate compelling reasons for review by establishing that newly discovered evidence became available during and after his trial, but was not permitted to be used due to his trial attorney's reticence as well as the trial court's opposition. Not only does this issue involve important federal questions, specifically, fundamental fairness and due process in the face of newly discovered, potentially exculpatory evidence, but represents an issue of significant public interest: If new evidence that, through recent scientific technology could exonerate the defendant exists, that evidence should be used. Unlike many other legal principles, the public can readily understand the concept of newly discovered evidence such as DNA. The public needs to have confidence that a criminal defendant can avail himself of that evidence. Indeed, as the use of DNA technology becomes more widely publicized, juries will come to expect it, like fingerprint evidence. The momentum is growing, spurred in part by the OJ Simpson trial, for DNA testing in criminal cases. See "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," June 1996, infra. Because daily news reports contain such topics as the human genome project and trials using sophisticated scientific evidence, society now readily comprehends the value of the evidence, while not necessarily understanding the science. While the public may not understand how DNA works to exonerate or convict, the public does understand that to deny its use is to deny justice.

The use and value of newly discovered evidence in order to achieve true justice has received a great deal of publicity recently, particularly through increased news reports on Innocence Projects run by law schools and individuals being cleared by newly discovered evidence such as DNA. Reports

of innocent men and women being released from long prison sentences or even from death row are not uncommon. For example, in the past three years, The Innocence Project in New York has obtained the release of 50 wrongly convicted prisoners through the use of DNA. (Criminal Defense Newsletter, MI State Appellate Defender Office, ("SADO"), Vol 24, No. 3, December 2000).

Very recently, US Supreme Court Justice Sandra Day O'Connor, gave a speech questioning the fairness of the death penalty, saying some death row inmates had inferior representation and may not have had access to DNA testing that might have cleared them. She noted that last year, six death row inmates were exonerated and freed; since 1973, Justice O'Connor continued, 90 inmates have been exonerated and set free. (The Associated Press State & Local Wire, July 3, 2001, "O'Connor Questions Whether Death Penalty Fairly Administered," by Brian Bakst.) A 1995 survey of laboratories reported that DNA testing excluded primary suspects in about one-fourth of the cases. Without DNA, many of those suspects would likely have been wrongfully convicted.

But it is not only DNA which exonerates. There are many more cases where there is strong evidence of innocence apart from DNA, but due to police and/or prosecutorial misconduct combined with ineffective assistance of counsel, a conviction was obtained. Id. In cases where DNA was not a factor, the Washington Innocence Project has obtained the release of nine wrongly convicted prisoners in the last two years. Id. Surely the success of programs like these Innocence Projects dramatically illustrates the value of using newly discovered evidence, both DNA and non-DNA. The present case has elements of both types.

Heightened public awareness and concern about the issue of newly discovered potentially exculpatory evidence is reflected in bills being introduced and passed in legislatures throughout the country. In Michigan, Governor John Engler recently signed into law one such bill: 2000 PA 401 authorized some post-conviction DNA testing of evidence. On the federal level,

an "Innocence Protection" bill has been introduced in the United States Senate[1] and numerous individuals have spoken in its support, including a former appellate judge who was a dissenter in a case which denied the use of newly discovered evidence. "Prepared Testimony of the Honorable Charles F. Baird Before the U.S. Senate Committee on the Judiciary." The defendant in that case, Roy Criner, had served 10 years of a 99-year sentence before being totally exonerated by newly discovered DNA evidence and the help of an Innocence Project. At the Senate hearing on the Innocence Protection bill, DNA specialist and criminal defense attorney Barry Scheck, whose New York-based Innocence Project has freed dozens of innocent inmates, including Roy Criner, testified in support of the bill.

Thomas M. Cooley Law School in Michigan recently opened such an Innocence Project. Cooley professor Norman Fell, the Project's director, explained the philosophy behind the new Innocence Project, stating:

> "To allow an innocent person to languish their life away in prison for a crime he did not commit is unconscionable. We now have scientific means by which guilt or innocence may be established to certainty. We have the means to correct a wrong. The system of justice will not be weakened by the process, but strengthened. It is wise to recognize that even the best of human systems will experience error. It is a sign of strength to own up to our mistakes, to minimize their impact and to correct them when we

[1] The bill would guarantee access to DNA tests for convicts who maintain their innocence, and provide for competent counsel in death-penalty cases. At present, the bill is in the Judiciary Committee.

can." ["Cooley Launches Innocence Project," Criminal Defense Newsletter, SADO, Vol 24, No. 3, December 2000.]

Society is keenly interested in this issue because of its need and desire for justice in as perfect a form as humans are able to attain it. This Court should review the Michigan Courts' failure to allow the full use of such evidence, not only to afford Martin justice, but to ensure the expanded use of such evidence, to achieve justice when we can.

DNA is a critically important new avenue of exploration for the criminal defendant. Martin in the present case seeks, among other things, judicial authority for testing certain newly discovered evidence for DNA in an effort to identify the person who sent threatening, incriminating letters and packages after Martin was convicted. If the results from this DNA evidence could be presented to a jury in a new trial, Martin is confident the verdict would be different.

As Attorney General, Janet Reno requested that the National Institute of Justice establish the National Commission on the Future of DNA Evidence in order to identify ways to maximize the value of DNA in our criminal justice system. Ms. Reno explained that she was motivated to make the request after reading the stories of 28 men whose innocence was proven by the use of DNA technology.[2] In September 1999, a branch of the Commission published the report, "Postconviction DNA Testing: Recommendations for Handling Requests," (hereafter, "1999 Report"). This report as well as accompanying case law supports Martin's request for access to the newly discovered evidence and will be addressed further, infra.

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2 The 28 stories are highlighted in the 1996 research report entitled, "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," published by the National Institute of Justice. Hereafter, the report will be referred to as the "Exonerated by Science Report."

A. Newly discovered evidence

This Court should grant Martin's petition for writ of certiorari with respect to the important issue of newly discovered evidence. The newly discovered evidence at issue in the present case took the following forms:

1. Use of Martin's driver's license

Martin's driver's license was stolen in October 1996. Even though defense counsel knew on the second day of trial that the license had been used to cash a forged check, he failed to use or investigate the information.

Two important facts give relevance to this information. Buyce, the likely killer in this case, lived across the street from where the checks were stolen. After Piedt was killed, Buyce had a teardrop tattoo on his face filled in; the teardrop had been merely an outline but was filled in after Piedt's death. A filled-in teardrop is a gang symbol indicating that the person with the filled-in teardrop killed someone.

How trial counsel could view this new evidence about the stolen driver's license as irrelevant is perplexing.[3] Not only did the likely killer, Buyce, live near the place where the checks were stolen, but, whoever cashed the check, probably Buyce, looked enough like Martin to get away with it. This critical information, coupled with the fact that Buyce had his teardrop tattoo filled in after the killing certainly was enough to warrant further exploration and use of the new evidence. The witnesses from the gun shop did not provide credible identifications or descriptions. The description offered by a witness at trial could have described a number of individuals besides Martin, including Buyce. South Haven, MI is a small town; the most recent census indicates the town has a

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3 Trial counsel's failure to actively respond to this newly discovered evidence is discussed in more detail under Issue II.

population of only approximately 10,000. In that case, it would not be unusual for the so-called eyewitness to have seen Martin around town in a wholly unrelated context.

2. Anonymous Letters and Packages

The anonymous letters and packages, which show someone other than Martin killed Piedt, were not obtained until after the jury had rendered its verdict. As stated previously, supra, some testing was done on copies of the letters; the originals were not allowed to be released to Martin. Also, trial counsel failed to request DNA testing for possible saliva traces on the stamps and/or envelopes. A transcription of the letters can be found in Appendix E. It should be noted, however, that the copies of the letters are extremely difficult to read, and, therefore, the transcription cannot fully reflect their content.

a. Package and note to Martin's maternal grandparents

One day after Martin's conviction, his maternal grandparents, the Cummings', received a package in the mail . The package, which lacked postal markings, was a small, brown, cardboard box, containing an alarm clock and a threatening letter. The letter threatens all Martin family members.

Part of this letter reads, "I killed that man[.] Allan [did] but he taking bolam for it." While not entirely clear, it certainly seems as though the author is saying he killed Piedt but Martin is taking the blame for it.

b. Letter to Martin's father

Two weeks after the trial, Martin's father received a letter postmarked April 23, 1997 from Kalamazoo, MI. The letter indicates that the author of the letter is sorry and that he had to lie to the police to avoid going to jail, that someone had "his boy after" the author, and that the author could not reveal his name. Although the letter also states that Allan killed "that man," the author next wrote that the person who stole Martin's driver's license "killed him." When this letter is read in conjunction with the letter to Martin's aunt (discussed next), it becomes apparent that the author(s) of the letters fail(s) to use the word "not." Therefore, it is reasonable to infer that the

author intended to state that Martin did **not** kill "that man" but that the person who stole Martin's driver's license killed "that man."

c. Letter to Martin's maternal aunt

Martin's aunt, Peggy Stepheson, received a letter postmarked May 1, 1997. Although the grammar in the letter is very poor, the reasonable interpretation of the words is that the author of the letter got rid of Martin and will now go after the rest of Martin's family. Also, although the author of the letter states that Martin killed Piedt, as previously discussed, the author fails to use the word "not." The author states that he did get caught for killing "that man" and for taking Martin's driver's license; however, Martin was the person convicted for killing "that man" and Martin has not been informed that his old driver's license has ever been recovered. Because the author has failed to use "not" when discussing the crimes he, the author, has committed, it is reasonable to infer that he failed to use "not" when stating that Martin killed "that man."

d. Letter to Martin's maternal grandfather

Mr. Cummings not only received a package and note in his mailbox, but also received a letter in an envelope post-marked May 15, 1997 from Kalamazoo, MI. The letter said that the person who stole Martin's driver's license was the killer and that if Martin did not admit to killing Piedt, Martin's father and other family members would be killed.

e. Scientific analysis notes/letters & envelopes

Martin moved the Court of Appeals for scientific analysis of the notes/letters and corresponding envelopes to locate imprints and latent prints in order to identify the author of the letters/notes. The Court of Appeals ordered that only Electro Static Detection Apparatus (hereafter "ESDA") tests would be conducted. The ESDA tests showed no impressions which might identify the author. However, the examiner noted that some samples had been tested for fingerprints so ESDA was hindered.

One fingerprint was recovered from the documents. The print had no matches with prints in Automated Fingerprint

Information System (hereafter "AFIS").

Copies of each note/letter and corresponding envelope were sent to Speckin Forensic Laboratories in order to compare the writing samples and determine whether one or more persons wrote the samples. The samples provided were the notes/letters sent to Martin's family members. From the samples provided, Speckin opined that one person wrote the note in the box left in Cummings' mailbox and the letter and corresponding envelope sent to Martin, Sr. Speckin further opined that one person wrote the letter and corresponding envelope to Peggy Stepheson and letter and corresponding envelope to Cummings. Speckin opined that the same person might have written all notes and letters because of the similar disguises used.

More important, Speckin indicated that had he been able to receive the original documents, he may have been able to provide more identifying information, but release of that critical information was not permitted.

B. Criteria for granting new trial

There are four criteria to warrant the grant of a new trial based on newly discovered evidence:

(1) the evidence, not its materiality, was newly discovered;

(2) the newly discovered evidence is not cumulative;

(3) the newly discovered evidence is such that a different result is probable on retrial of the cause; and

(4) with reasonable diligence, defendant could not have discovered and produced the newly discovered evidence at trial.

People v Barbara, 400 Mich 352, 362-363; 255 NW2d 171 (1977); United States v Seago, 930 F2d 482 (CA 6, 1991). See also 28 U.S.C. Section 2244(b)(2). When a motion for a new trial based on newly discovered evidence is granted, the decision will not be disturbed unless the court clearly abused its discretion. United States v Pierce, 62 F3d 818, 823 (CA 6, 1995). While the decision to grant a new trial on the basis of newly discovered evidence is discretionary, such discretion should be exercised wisely for the purpose of promoting justice and protecting the

innocent. People v Inman, 315 Mich 456; 24 MW2d 176 (1946).

A motion for new trial is governed by both statute and court rules. Under the statute, the trial judge may grant a new trial to Defendant "for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done and on such terms or conditions as the court shall direct." MCL 770.1; MSA 28.1098. This statute has been interpreted to support the granting of a new trial where the trial judge finds that the guilty verdict was not in accordance with the evidence and that an injustice has been done. People v Hampton, 407 Mich 354, 373; 285 NW2d 284 (1979). A new trial should be granted when the evidence preponderates heavily against the verdict so it would be a serious miscarriage of justice to permit it to stand. People v Lemmon, 456 Mich 625; 576 NW2d 129 (1998).

In the present case, it would be an injustice not to allow the newly discovered evidence, and would be a serious miscarriage of justice to permit Martin's conviction to stand.

1. Criteria Met as to Driver's License Evidence

The trial court determined that the use of Martin's driver's license was not newly discovered because it was made known to defense counsel during trial. In actuality, the use of Martin's driver's license was newly discovered. Martin's father did not learn of the use of Martin's stolen driver's license to cash a stolen check until the night of the first day of trial and informed the defense counsel about it on the morning of the second day of trial. This occurred after defense counsel already told the jury in opening statements that Martin had shot Piedt. Importantly, the information did not become known to Martin until it was too late to use it: after defense counsel prohibited a defense that Martin was not Piedt's assailant. Hence, it is newly discovered. See, e.g., People v Miller (aft rem), 211 Mich App 30, 44-46; 535 NW2d 518 (1995), in which it was determined that information was newly discovered, even though the prosecution had the information before trial but had failed to provide it to the defendant, who learned of it after being convicted.

The evidence at issue is completely material. Martin's identity as Piedt's assailant should have been challenged at trial. Had identity been made the issue, and it would be upon retrial, the information that someone was using Martin's driver's license to cash a check would be very material. This evidence goes to the very heart of the argument that someone looks enough like Martin to use photo-identification of Martin to cash a check. The only eyewitness identification of Martin was vague enough to include any number of other young men. Not only is South Haven, MI a small town where the eyewitness may have seen Martin around town, but eyewitness testimony in general is fraught with problems. In the 1996 "Exonerated by Science" Report, the authors found in a majority of the 28 cases of wrongful conviction, eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong, given the fact that DNA testing eventually exonerated each one of those defendants. See Exonerated by Science, p 33. The Exonerated by Science Report highlights in particular the case of Dale Brison. The report states:

> The Commonwealth's evidence consisted primarily of the victim's identification testimony. However, the victim's stab wounds in addition to the weather and reduced visibility may well have affected the victim's ability to accurately view her assailant, and thus, she may have been prompted to identify appellant merely because she remembered seeing him in the neighborhood. [See "Exonerated by Science" Report, p 33, quoting Commonwealth v Brison, 618 A2d 420, 425 (Pa Super. 1992); emphasis added.]

Dale Brison was fortunate. He eventually was freed due to DNA evidence, despite "compelling" eyewitness identification. In the present case, the driver's license evidence is strong rebuttal evidence to what is a problematic, yet

influential, eyewitness identification.

In United States v Bagley, 473 US 667, 682; 105 S Ct 3375; 87 LE2d 481 (1985), this Court stated evidence is material when there is a "reasonable probability" that the result of the trial would have been different if the evidence in question was used. Reasonable probability was defined as "a probability sufficient to undermine confidence in the outcome." Id. The evidence of a third party using Martin's driver's license, under the circumstances here, constitutes evidence sufficient to undermine the outcome.

The information is not cumulative. There was no testimony at the trial about Martin not being Piedt's assailant. Newly discovered evidence which goes directly to the question of guilt or innocence and corroborates a defendant's claim of innocence is not cumulative. People v Cummings, 42 Mich App 108; 201 NW2d 358 (1972).

Contrary to the trial court's decision, a different result is probable upon retrial. Identifying information of Martin was not elicited by defense counsel. This was essential to support the claim that Buyce, not Martin, shot Piedt. Exculpatory evidence would be admitted upon retrial. The evidence connecting Martin to the crime is not as strong as the lower courts make it appear. Much of the connection is made through Martin's own testimony, such as identifying the weapon used to shoot Piedt. But when Martin testified, he was barely 18 years old and trusted his attorney, even when that attorney persuaded him to admit guilt. Again, the trial judge acknowledged that he believed Martin's father when he testified he had never been informed Martin might have to testify. It is true that Crystal Fisher also testified about Martin's alleged admissions to her. But her credibility should be attacked upon retrial due to her association with the gang involved with the killing of Piedt.

The trial court relied on its own self-serving statement regarding the strength of the prosecution's case. However, the evidence directly connecting Martin with the death of Piedt consisted only of Martin's testimony and defense counsel's

stipulations and admissions to the jury. The prosecution did not have information directly connecting Martin to the killing, only connecting Martin to the disposal of the weapon used to kill Piedt. Such facts would warrant conviction of accessory after the fact only. The newly discovered evidence discussed herein would bolster Martin's identity defense to such a degree as to make a different outcome highly likely.

Finally, no amount of diligence could have uncovered the information at issue here. The information was held solely by the victim of the forgery. No police report was filed. No one knew of the use of Martin's driver's license to cash the stolen check until the forgery victim received his checks with his bank statement in April 1997, the eve of trial.

In Miller, supra, the court determined that no reasonable amount of diligence could have discovered the information possessed by the prosecution. The facts in the present case are more compelling: a private individual was the only person who had the information. Therefore, no amount of diligence could have uncovered the information.

This sort of odd occurrence was crucial evidence which defense counsel should have probed to the fullest possible extent. The chances of this check-cashing incident being related to the crime for which Martin was convicted are simply too high to ignore, as they were, unfortunately, by Martin's attorney. Surely, the occurrence warranted a motion for mistrial and/or a serious retooling of the defense. Yet, nothing was done with the information. Defense counsel clearly let down his client who now faces a lifetime of imprisonment. The evidence was, in sum, profoundly material, and the fact that it was not used by defense counsel lends heavy support to Martin's claim of ineffective assistance of counsel, discussed infra, Issue II.

Jurors have the keen ability to discern when certain evidence is more than mere happenstance; they are fully capable of realizing the difference between coincidence and reasonable doubt. In the present case, jurors should be afforded the opportunity to make their assessment of who the killer was

with the benefit of all relevant and material evidence, including the unlawful use of Martin's driver's license by a gang member who resembles Martin and took credit for the murder. Justice requires that much. All elements are satisfied to warrant the grant of a new trial based on the information relating to the use of Martin's driver's license to cash a check.

2. Criteria Met as to Anonymous Letters and Packages

The elements for granting a new trial are also satisfied with regard to the newly discovered threatening letters and notes received by Martin's family members. They were discovered after Martin had been convicted. In addition, they were sent by an anonymous author, so no amount of diligence could locate them until the author sent them. The notes and letters were not sent until after Martin was convicted. As such, the notes and letters were newly discovered and no amount of diligence could have uncovered them.

Also, like the driver's license information, the notes and letters are completely material. They are filled with statements against penal and civil interests, thus warranting their admission at trial. MRE 804(b)(3). Therefore, at least a redacted version of the notes and letters would be admissible under MRE 804(b)(3), which applies when the declarant is unavailable and which would be the case with these anonymous letters and notes if further scientific analysis could not identify the author.

It is possible the notes and letters could also be admitted under MRE 803(24). Although the trial court deemed the notes and letters inadmissible under MRE 803(24) because of the requirement of trustworthiness, that ruling was premature. A disturbingly insufficient analysis was conducted to locate the author of the notes and letters. Even a lay person could easily understand that when attempting to ascertain who wrote certain letters, it is highly desirable, if not necessary, to have the original copies of the letters in question. Had the original notes or letters been presented to Speckin, he may have been able to better determine identifying information from them. Also, DNA testing could definitively determine who sent

them. The requirements of MRE 803(24) could be met upon retrial: (1) the notes and letters go to a material fact, who is Piedt's assailant; (2) the statements are more probative on the point for which they are offered than any other evidence that Martin can procure through reasonable efforts; and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statements. Martin's chance to present a defense is tied to these notes and letters. Given the seriousness of the charge, the court should make every effort to assure that Martin can present a defense. The jury should be able to use the notes and letters to render an informed verdict.

The fact that the original letters and packages were not released to Martin for testing presents a Brady problem. In Brady v Maryland, 373 U.S. 83; 83 S Ct 1194; 10 LEd 2d 215 (1963), the Supreme Court held that a defendant has a constitutional right to be informed of exculpatory evidence in the hands of the State. Martin acknowledges the original copies of the letters and packages constitute potentially exculpatory evidence only. Nonetheless, in a case of such magnitude, where a man's lifetime liberty is at stake and where the actual killer has not been apprehended, release of the originals for testing is justified. Moreover, as discussed immediately below, courts are now extending Brady to requests for potentially exculpatory evidence.

Valuable DNA evidence may be available for use in Martin's defense; specifically, he contends there may be valuable DNA evidence on the envelopes where the author(s) of the letters may have licked the glue to seal it as well as where the stamps may have been licked. Accordingly, Martin requests he be granted a new trial where not only the original letters may be analyzed, but also where the envelopes and/or packaging may be tested for DNA evidence. Martin's request is amply supported by case law.

The "1999 Report," supra, which issued recommendations for handling requests for postconviction DNA testing, examined the question, "Is there a constitutional right to

testing under the Brady doctrine?" The report indicates strong support for this idea.

Again, in Brady v Maryland,supra, the Supreme Court held that a defendant has a constitutional right to be informed of exculpatory evidence in the hands of the State. As the 1999 Report discussed, a number of courts across the country have extended Brady to requests for DNA testing even when the request is made after trial and even though it is only potentially exculpatory evidence that is sought. The 1999 Report states:

> "While the weight of reported cases acknowledges a right of access to the evidence for purposes of DNA testing on Brady grounds, there are many unreported, summary decisions in which trial courts have simply dismissed applications for postconviction testing without reaching any Brady-based constitutional arguments." [1999 Report, pp 23-24; emphasis added.]

Martin, through aggressively asserting his rights to access and testing of all newly discovered evidence is attempting to avoid being one of the unfortunate ones whose requests have been summarily denied.

The 1999 Report highlights an early case applying Brady in a similar situation. The case, Matter of Dabbs v Vergari, 570 NYS 2d 765;149 NYM2d 844 (New York 1990), involved an inmate who requested access to perform DNA testing prior to a possible motion to vacate his conviction based on newly discovered evidence. See 1999 Report, p 24. The prosecutor argued there was no statutory right to the postconviction discovery, that the test results were merely speculative and that granting this request would only lead to a flurry of other requests for DNA testing. The Dabbs Court, relying on Brady, supported its decision to allow the requested testing as follows:

> "A defendant has a constitutional right to be

informed of exculpatory information known to the State.

> While it is unclear what such testing will ultimately reveal, defendant has demonstrated an adequate foundation for the testing by showing that the [evidence sought] has high exculpatory potential." [Dabbs, supra, at 767-768; emphasis added.]

Ultimately, DNA testing exonerated Dabbs and his conviction was vacated. See People v Dabbs, 587 NYS2d 90, 93; 154 NYM2d 671 (New York 1991).

Similarly, in State v Thomas, 586 A2d 250; 245 NJS 428 (New Jersey 1991), the court rejected lateness arguments from the prosecution and held that DNA evidence is such a potentially powerful tool to demonstrate actual innocence that even the most unyielding procedural bars must give way. The Thomas Court cited "fundamental fairness" and noted that even when procedural requirements are meticulously followed, our system fails every time an innocent person is convicted. Id. at 253-254. Thomas concludes "we would rather [permit the testing] than sit by while a [possibly] innocent man . . . languishes in prison while the true offender stalks his next victim." Id.; see also 1999 Report, p 24.

In Harvey v Horan, ___ F Supp 2d ___ (#00-1123-A, 4-16-01), the plaintiff, convicted of rape and forcible sodomy in 1990, sued for release of biological evidence which the defendant prosecutor would not turn over. Conventional serology testing on the items recovered from the rape kit could not exclude the plaintiff or his co-defendant, who was also convicted. The Harvey Court cited the 1999 Report, discussed supra, rejecting the prosecutor's argument that this report constituted inadmissible hearsay evidence. Id. The court noted the 1999 Report provides a "sound framework" for analysis of requests for postconviction DNA testing. Further, the Harvey court ruled it was premature to analyze the case in terms of the factors needed to win a motion for new trial based on newly discovered evidence. See e.g., United States v

Barlow, 693 F2d 954, 966 (CA 6, 1982), supra. Rather, the Harvey court reasoned, the crucial issue was whether the plaintiff had made a sufficient showing that access to the new evidence was necessary to ultimately raise an argument pursuant to such cases as Barlow, supra. Harvey, p 5.

Harvey cited Matter of Dabbs, supra for the proposition that:

> "[W]here evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after Conviction. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. It is flexible and calls for such procedural protections as the particular situation demands." [Harvey, supra, p 4, citing Dabbs, supra; citations omitted.]

To deny the plaintiff's request for such "potentially powerful exculpatory evidence" would constitute a miscarriage of justice, the court ruled. Harvey, supra, at 5.

Pursuant to Brady, the Harvey court ruled, the plaintiff had a due process right of access to the DNA evidence and to conduct DNA testing, as such evidence could constitute exculpatory evidence. Harvey, supra, p 5.

Other cases embracing a Brady analysis are: Sewell v State, 592 NE2d 705, 707-708 (1992) (inmate allowed access to rape kit for DNA testing 10 years after conviction notwithstanding the absence of discovery procedures; "Advances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of truth."); Commonwealth v Brison, 618 A2d 420, 423; 421 PaS 442 (Pennsylvania 1992) ("where evidence has been preserved, which has high exculpatory potential, that evidence should be discoverable after conviction"); Mebane v State, 902 P2d 494, 497; 21 Kan App 2d 533 (1995) (requests for DNA testing can be granted

under Brady when proper showing made). See 1999 Report, pp24-25.

In the present case, the original letters, along with envelopes and stamps, have been preserved. Their exculpatory potential is high, and in this particular situation, due process requires their testing and use at a new trial. While the evidence would not directly exonerate Martin, it could show that someone other than Martin committed the crime. The jury should be permitted to weigh the evidence that resulted from a bizarre set of events involving threatening, incriminating letters and packages sent to family members after Martin's conviction.

The Harvey court, supra, wrote that a constitutional basis for access to biological evidence was recently noted by a judge in the Eastern District of Louisiana in Charles v Greenberg, 2000 WL 1838713, *3 (ED LA 2000). The quote selected by the Harvey court refers equally well to Martin in the present case. Specifically, like the appellants in Harvey and Charles, Martin is "'riding the crest of a new body of law using the latest science to free innocent men and women.'" Harvey, supra, quoting Charles v Greenberg, supra. Martin is confident this new body of law can lead to new trial where the actual killer will be identified and Martin will be exonerated.

Further investigation into the identity of the author(s) of the letters and packages was ceased by the local police. One wonders why the search for the truth and, ultimately, for justice, was stopped. Tragically, a man is dead in this case. But this case also involves an 18 year-old who was ill-served by his attorney and by the local police investigators. Why not allow analysis of the original notes and letters? What harm could come from a complete examination of the evidence? Did the police fear what might be discovered, or were they merely in a hurry to close this case? The county constable who helped locate the evidence which exonerated Roy Criner (discussed supra) aptly reflected on how the system had so many times failed Criner: "[y]ou should never be ashamed of the truth." Further investigation is essential in the present case.

In the case of serial murderer Timothy Wilson Spencer,

another man, David Vasquez, who was innocent, confessed to murder, pleaded guilty, and spent four years in prison. FBI profilers had suggested that the true rapist/murderer was a white male. However, the DNA pattern of Spencer, a black male, matched the DNA from semen taken from four of the murder scenes. Vasquez confessed and pleaded to the fifth murder, which did not have sufficient biological evidence for DNA testing but which matched the modus operandi of the other four rape/murders, (for which Spencer was convicted), and another unprosecuted rape in which Spencer's DNA matched DNA from the crime scene. Although not directly exonerated by DNA testing, Vasquez was released because of the unique MO of the many rapes and murders, and because the FBI believed the same person committed all the crimes. Commonwealth v Spencer, (I) 384 SE2d 775; 238 Va 275 (Va 1989), (II) 384 SE2d 785; 238 Va 295 (Va 1989), (III) 385 SE2d 850; 238 Va 563 (Va 1989), (IV) 393 SE2d 609; 240 Va 78 (Va 1990) (four death penalties affirmed; Spencer executed on April 27, 1994).[4]

The Spencer case is an eerie illustration of what can go terribly wrong in our justice system. For reasons that are unclear, Vasquez confessed and served time for crimes he did not commit. Fortunately for Vasquez, through DNA testing and good investigative work, the actual perpetrator was identified. Because of inexperience, misplaced trust in his attorney, confusion, or a combination thereof, Martin in the present case testified at trial that he shot Piedt. His own testimony constituted the primary evidence against him. As was the case with David Vasquez, it is unclear why Martin would incriminate himself in a crime someone else committed,

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[4]This case is now a book, Stalking Justice, Paul Mones, Pocket Books 1995.

except that his attorney persuaded him to testify in that manner. However, DNA testing led to the real killer in Spencer, and the same can happen here. It is important to note that Vasquez was not directly exonerated by DNA testing; similarly, in the present case, DNA testing will not directly exonerate Martin, but will likely point to the actual killer.

Concepts of fundamental fairness as well as the public's interest in the appropriate use of newly discovered evidence require a new trial in the present case. Putting forth this newly discovered evidence at a new trial to a new jury is necessary in order to preserve Martin's rights to present evidence in his favor, due process, and a fair trial. US Const, Ams V, VI, XIV. Few rights are more fundamental than that of an accused to present evidence in his own defense. Chambers v Mississippi, 410 US 284, 302; 92 S Ct 1038; 35 L Ed 2d 297 (1973); Washington v Texas, 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). The right to due process and a fair trial require that Martin be given a new trial where he can present the newly discovered evidence discussed herein. "A fair trial in a fair tribunal is a basic requirement of due process: [T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" In re Murchison, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955), quoting Offut v United States, 348 US 11, 14; 75 S Ct 11; 99 L Ed 11 (1954).

Members of the public, which obviously includes jurors, possess the ability to see through phony attempts by defendants to escape responsibility. The public is not interested in allowing defendants unlimited "bites at the apple" in the justice system. However, the public clearly has an interest in seeing that the accused is not denied a fair opportunity to present evidence simply because that evidence is newly discovered. People in our society understand that situations like the one in the present case don't "just happen." Checks don't just disappear from a business near the likely killer's home and then resurface after being cashed using Martin's photo-identification--while Martin sat in jail. Threatening letters and packages don't just start appearing at

family members' homes without a reason after a gang-related conviction. A gang member and likely killer in this case doesn't just happen to have his tear-drop tattoo filled in after Piedt's death. The newly discovered evidence in the present case coupled with the shortcomings of the prosecution's case and ineffective counsel constitute important evidence which very probably would lead to a different outcome upon retrial. The public recognizes this and is willing to support a second trial before condemning a man to prison for the rest of his life.

The elements are satisfied to warrant the grant of a new trial based on the newly discovered notes and letters. The trial court abused its discretion in denying Martin's motion for a new trial, as all elements were satisfied to show that the information was newly discovered and a different result was probable upon retrial. The trial court was biased because it incorrectly believed the prosecution had a very strong case; the court believed that upon retrial, Martin would admit to the crimes charged as occurred through his defense counsel in the trial below. The trial court was convinced Martin had committed the crime because of Martin's compelled testimony. In sum, the trial court's decision was "not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959). A new trial is warranted.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MARTIN'S MOTION FOR NEW TRIAL WHERE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Michigan's Constitution mandates: "in every criminal prosecution, the accused shall have . . . assistance of counsel for his defense." Const 1963, art 1, ' 20. The United States Constitution mandates: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." US Const, Am VI. Powell v Alabama, 287 US 45, 71; 53 S Ct 55; 77 L Ed 158 (1932);

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 674 (1984). A defense attorney is ineffective when his actions or omissions are not the result of "reasonable professional judgment" and when his performance is "deficient." Strickland, 466 US at 668,687. To establish ineffectiveness, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. Strickland, 466 US at 687; Pickens, supra. To show prejudice, the defendant must demonstrate a "reasonable probability" that the result of the proceeding would have been different absent counsel's errors. Strickland, 466 US at 694; People v Lavearn 448 Mich 207, 216; 528 NW2d 721 (1995).

When defense counsel's actions are a matter of trial strategy, courts will not deem them to be constitutionally ineffective. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991). If that strategy is not sound, however, counsel's actions may require reversal. People v Dalessandro, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). "[T]o establish prejudice, a criminal defendant . . . must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is [presumed] reliable." Pickens, supra, 338.

Defense counsel testified that early in the representation, he had determined that Martin would have to testify due to his confessions. Defense counsel even testified that after the preliminary exam, he talked with Martin **and** his parents about how the case might need to proceed and this included Martin testifying. Later, however, defense counsel stated, with regard to his intention to call Martin to testify: "I don't know whether or not I did OR--I--It was my intention." Moreover, the trial court found Martin's father to be credible; Martin's father testified he had never been informed his son might have to testify. Defense counsel could produce no written documentation that he spoke with Martin about testifying.

At the hearing on the motion to compel the testimony of co-defendant Schramm, defense counsel clarified that Martin

would not be testifying if the co-defendant testified. This statement is completely consistent with Martin's testimony at the motion for a new trial: Martin's understanding was that the co-defendant would testify but Martin would not. Moreover, at the hearing to compel testimony, defense counsel stated he needed to know before the jury was picked if the co-defendant was going to take the stand, plead the Fifth, or have the plea revoked; he explained he needed to know this for the opening statement. Defense counsel could not have been more explicit as to how the fact that the co-defendant was not testifying affected his opening statement. It is unreasonable to require a more explicit statement to establish that defense counsel had not intended to call Martin to testify.

Another critical error by trial counsel was his failure to make identity an issue. Rather than admitting Martin's guilt during opening statement, trial counsel should have at least waited until the end of the trial, before venturing down a path that precluded defenses. Counsel failed to adequately represent his client by ignoring the identifying characteristics of Martin.

Trial counsel had been told, for example, that Martin is left-handed, but this valuable information was not used to identify the actual killer. Common sense mandates that the hand used to hold the gun would affect the path taken by the bullet. Unfortunately, trial counsel failed to explore this avenue and the Michigan courts refused to help elucidate the issue by refusing to grant an evidentiary hearing to ascertain what effect being left-handed would have on the trajectory of the bullet. The height of the assailant also was important in terms of the path of the bullet. Piedt's right side was facing the assailant. Nothing was elicited at trial about the exact positions of the assailant and victim.

At trial, the description of the purported assailant provided by one of the prosecutor's witnesses was very broad. This description could have identified many male subjects, including Buyce, the likely actual killer.

When the information about a person using Martin's driver's license was made known to defense counsel, rather than

stumbling ahead, he should have moved for a mistrial. But, defense counsel refused to acknowledge the significance of the driver's license evidence. When he learned of this new evidence, he had already told jurors Martin killed Piedt.

A motion for a mistrial would have been entirely appropriate when the identification information became available. A mistrial is appropriate under two circumstances: "(1) where there was 'manifest necessity' to declare the mistrial or (2) where the defendant consented to the mistrial and was not goaded into consenting by intentional prosecutorial misconduct." People v Tracey, 221 Mich App 321, 326; 561 NW2d 133 (1997). The present case is a perfect example of when a mistrial should have been requested because exculpatory information (someone looks enough like Martin in order to use his driver's license as picture identification to cash a check) unknown to the prosecutor and defense counsel was discovered after the jury was empanelled and after defense counsel admitted Martin's guilt to the jury. But for defense counsel's admissions to the jury, the information could have been used to argue that Martin was not Piedt's assailant.

A recent legal malpractice case highlights the necessity for trial counsel to pursue viable defense theories on behalf of his client. An attorney was ordered to pay $2.6 million for failing to seek a newer DNA test, even after the attorney had sought a conventional DNA test. See Lawyers Weekly USA, "Lawyer Ordered to Pay $2.6 Million for Failing to Seek DNA Test," 200 LWUSA 1009. The attorney had sought DNA testing of semen from the crime scene. The attorney happened to learn of a very new type of DNA testing, but did not follow up on the new test, which was only being performed at one lab in the country at that time. At the malpractice trial, the convicted man argued his attorney should have pursued this more sophisticated test. The jury agreed. This newer test ultimately exonerated the man, who had spent over four years in prison.

The attorney who represented the wrongly convicted man in the malpractice case stated, "Our theory was, once [trial

counsel] found out about [the new DNA test], he had an obligation to pursue it." Id.; emphasis added. Similarly, in the present case, when trial counsel learned of the driver's license information, he had an obligation to pursue that evidence. Like the newer DNA test, the driver's license evidence would have caused trial counsel to take on additional burdens, such as retooling the defense or moving for mistrial. Yet, Martin relied on trial counsel to represent him vigorously, and trial counsel let him down grievously.

As an advocate, counsel must subject the prosecution's case to the "crucible of meaningful adversarial testing." United States v Cronic, 466 US 648, 656-657; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defense counsel's failure to investigate has been held to constitute ineffective assistance of counsel. People v Nickson, 120 Mich App 681, 684-685; 327 NW2d 333 (1982); People v Lavearn, 201 Mich App 679; 506 NW2d 909 (1993). Effective assistance of counsel may also require the presentation of evidence supporting the accused's defense. United States v Merchant, 992 F2d 1091 (CA 10, 1993); People v McPeters, 181 Mich App 145; 448 NW2d 770 (1989).

Martin's trial counsel in no way subjected the prosecution's case to the "crucible" of adversarial testing. Rather, trial counsel made the prosecutor's job easier. Martin's trial attorney should have taken the new evidence available to him and made the most of it for Martin's benefit.

Defense counsel compounded his error of admitting Martin's guilt to the jury when defense counsel stipulated that he would allow the admission of the weapon allegedly used to kill Piedt and informed the jury that Martin would testify to the fact that the weapon admitted was the weapon used by him to kill Piedt. Such a stipulation is tantamount to defense counsel admitting guilt to all crimes charged. In the present case, it was Martin who identified the weapon used to kill the victim. This burden was on the prosecution, but defense counsel **alleviated** that burden with the stipulation. There was no testimony connecting the bullet retrieved from Piedt to the weapon, except through Martin.

The general rule is that a reviewing court will not second guess a trial counsel's strategy. People v Martin, 210 Mich 139, 141; 177 NW 193 (1920). However, courts do not allow trial counsel to pursue a strategy that involves an admission to guilt without requiring the trial counsel to first obtain permission from his or her client to make such an admission. People v Krysztopaniec, 170 Mich App 588, 595-596; 429 NW2d 828 (1988), citing People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982). This did not occur in the present case.

Furthermore, the present case is distinguishable from Krysztopaniec, supra. The admissions of defense counsel caused Martin to feel he had no option but to testify. Therefore, defense counsel should be required to establish by independent evidence that he had actually obtained Martin's permission to admit guilt in the killing of Piedt. But defense counsel could provide no such independent evidence.

Defense counsel also failed to assert sufficient reasons to procure the testimony of the co-defendant. Defense counsel moved the trial court to require the prosecution to grant immunity to Schramm in order to ensure that he would testify to provide exculpatory evidence. Such a procedure is supported by law. See People v Julian, 171 Mich App 153, 159-160; 429 NW2d 615 (1988); People v Iaconnelli, 112 Mich App 725, 759; 317 NW2d 540 (1982), modified on other grounds, People v Harold (On Remand), 116 Mich App 176; 321 NW2d 684 (1982). Defense counsel's reason for the request was that he wanted Schramm to testify as to why Schramm and the assailant went to the gun shop, namely, to price guns. The trial court denied the motion stating such information could be brought out through other witnesses.

Something only Schramm and the assailant know is how Piedt was standing, or bending over relative to the assailant, when Piedt was shot. This was never discovered at trial. But, only the co-defendant could testify as to the relative positions of Piedt and his assailant.

The relative positions of Piedt and his assailant are important because of the hand with which Martin writes and shoots. If

defense counsel had used this reason when making his motion to obtain testimony from Schramm, then the trial court should have reached a different conclusion with regard to whether the prosecution should be required to grant Schramm immunity in order to obtain his testimony. Again, this shows that defense counsel continually ignored exculpatory information provided to him from Martin.

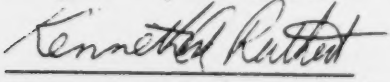
Although Martin may have originally admitted to killing Piedt, that most likely occurred because of the pressure placed on him by gang members to take responsibility for the killing. Martin later retracted his confession.

The facts necessitate a new trial. First, defense counsel admitted to the jury that Martin killed Piedt without first obtaining Martin's permission. Second, Defense counsel made it impossible for Martin not to testify at trial and perjure himself due to the admission and stipulation on the record regarding the weapon by defense counsel. Third, defense counsel's statements made it impossible to make identity an issue. Fourth, defense counsel should have requested a mistrial once the stolen driver's license information was given to him by Martin's father. Last, defense counsel failed to provide adequate reasons to the trial court to grant immunity to Schramm. In sum, counsel's ineffective performance deprived the jury of critical evidence which could inform its analysis of Martin's guilt or innocence, and it deprived Martin of competent representation, to which he is entitled under the US Constitution. Strickland, supra.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Docket No. 118220

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ALLAN GENE REEDER MARTIN, JR.,
Defendant-Appellant.

April 30, 2001

Corbin R. Davis, Clerk

On order of the Court, the application for leave to appeal from the September 29, 2000 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Docket No. 218813

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ALLAN GENE REEDER MARTIN, JR.,
Defendant-Appellant.

November 21, 2000

Carl L. Gromek, Chief Clerk

The Court orders that the motion for rehearing is DENIED.

/s/Richard Allen Griffin
Presiding Judge

APPENDIX C

IN THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

Docket No. 218813

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ALLAN GENE REEDER MARTIN, JR.,
Defendant-Appellant.

Before: Griffin, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28. 424(2). Defendant was sentenced to life in prison without parole for the felony murder, and a consecutive two years on the felony-firearm conviction. We affirm.

This case arises from a murder that took place in Berrien County at John Piedt & Sons Gun Shop. The shop was owned and operated by Darrell Piedt, the victim, and his son, Brad.

I

Defendant first argues the trial court abused its discretion by refusing to grant defendant's motion for new trial on the basis that he received ineffective assistance of counsel. We disagree.

Under MCR 6.431(B), a court may order a new trial on "any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." This Court reviews a trial court's decision whether to grant a new trial for an abuse of discretion. People v Torres (On Remand), 222 Mich App 411, 415; 564 NW2d 149 (1997). "The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." Id.

In order to establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness compared to professional norms, and the ineffective representation so prejudiced him that he was deprived of a fair trial. People v

Pickens, 446 Mich 298, 309; 521 NW2d 797 (1994); People v Henry, 239 Mich App 140, 146; 607 NW2d 767 (1999). To demonstrate the requisite prejudice, a defendant must prove that, but for errors of counsel, there was a reasonable probability of a different outcome. Pickens, supra at 314. To prevail, defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. People v Rick (On Remand), 235 Mich App 429, 444; 597 NW2d 843, 852 (1999); Henry, supra at 146. In reviewing matters of trial strategy, such as whether to call a witness, introduce evidence and present a particular defense, a reviewing court will not substitute its judgment for that of defense counsel. People v Barnett, 163 Mich App 331, 338; 414 NW2d 378 (1987); People v Hedelsky, 162 Mich App 382, 387; 412 NW2d 746 (1987).

At the hearing on defendant's motion for a new trial, the trial court heard testimony from both defendant and his trial counsel. The trial court found trial counsel's testimony to be credible and, conversely, defendant's testimony to be incredible. The court ultimately ruled defendant had not established his right to a new trial.

On appeal, defendant advances numerous alleged instances of ineffective assistance of counsel which purportedly demonstrate error requiring reversal. According to defendant, his trial attorney was ineffective because he failed to make the identity of the killer an issue in the case, he admitted that defendant shot the victim and stipulated to the admission of the murder weapon, and he failed to assert sufficient reasons in support of his request that the trial court order the prosecutor to grant immunity to the codefendant. However, a thorough review of the record does not substantiate these claims and leads us to conclude that defendant's motion for a new trial was properly denied by the trial court.

At the hearing on defendant's motion for a new trial, defendant's counsel testified that the prosecution's case

against defendant was strong and left him little room to devise a feasible defense. Defendant had been seen at the gun shop shortly before the murder. The day after the murder, defendant explained in detail to his girlfriend Crystal Fisher how he went to the gun shop with his codefendant, shot the victim in the head, and stole several guns. Fisher saw defendant, his codefendant, and others filing the serial numbers off of some guns. Defendant's fingerprint was located on the trigger of one of the guns missing from the shop, which was later found at the house where defendant had been seen by Fisher filing the serial numbers from the guns. After his arrest, defendant gave the police a detailed confession in which de described going with his codefendant to the gun shop, shooting the victim in the head, taking guns and hiding them, and throwing the gun used in the shooting into the river. Although defendant subsequently told one of the detectives he did not shoot Mr. Piedt, that same day she showed the police where he had thrown the gun into the river. A dive team found the gun used to shoot the victim in the location described by defendant.

Trial counsel further testified at the hearing that defendant failed a private polygraph test scheduled by defense counsel. After he failed the test, defendant confessed with great emotion to counsel that he had killed Piedt and asked counsel not to tell his parents. Thereafter, defendant did not offer any alternative explanation of his participation (or lack thereof) in the murder. On the basis of these facts, the trial strategy evolved which, according to the testimony of trial counsel, was jointly formulated and pursued by himself and defendant. The planned defense was that defendant did in fact kill Piedt, but the homicide was not first-degree murder, but a lesser offense. This defense required defendant to testify that he had killed the victim before any theft of the guns was planned, without intending to kill him, and only after reacting when the victim moved toward the phone to telephone authorities. Defense counsel testified at the motion hearing that this trial

strategy was based on the totality of the case, including defendant's confession to him, the need to defend statements defendant gave to the police, and the physical evidence. Trial counsel testified that defendant was fully involved in the preparation of the case and knew what would transpire at trial. Consequently, there was no reason for defense counsel the identity of the killer an issue at trial.

The trial court found trial counsel's testimony that he and defendant discussed and planned the defense strategy employed at trial more credible than defendant's testimony that they did not. A trial court frequently has to evaluate credibility in deciding a motion for a new trial. See People [v] Mechura, 205 Mich App 481, 484; 517 NW2d 797 (1994). In this case, the court had to evaluate the credibility of defense counsel and defendant and make factual findings regarding who was telling the truth and what the preparation of the defense actually involved. A trial court's findings of fact are reviewed on appeal for clear error. People v Lester, 232 Mich App 262, 271; 591 NW2d 267 (1998). The trial court is in a superior position to assess the evidence. People v Zahn, 234 Mich App 438, 445; 594 NW2d 120 (1999). Therefore, this Court defers to the trial court's resolution of factual issues, especially when it involves the credibility of witnesses. People v Cartwright, 454 Mich 550, 555; 563 NW2d 208 (1997). A finding is clearly erroneous if, after considering all of the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. Id.

We find no clear error in the trial court's conclusion that defendant failed to overcome the preumption that, under the circumstances of the case, counsel's choice of a defense was sound trial strategy. Counsel's strategy was in fact circumscribed by what his client told him and by the prosecutor's evidence. In view of the overwhelming evidence that defendant did kill Mr. Piedt, it was reasonable, from a tactical standpoint, to attempt to convince the jury to convict

him of a lesser offense which would not result in his imprisonment for life without the possibility of parole. People v Emerson (After Remand), 203 Mich App 345, 349; 512 NW2d 3 (1994).

Contrary to defendant's assertion, trying to convince a jury that someone other than defendant killed Mr. Piedt would have been difficult and problematic. As previously noted, the substantial evidence adduced at trial proved defendant's involvement in the crime, and trial counsel reasonably refused to elicit at trial what he knew, based on defendant's confession to him, to be false testimony that someone else committed the murder. People v LaVearn, 448 Mich 207, 216-217; 528 NW2d 721 (1995); People v Hubbard, 156 Mich App 712, 715-716; 402 NW2d 79 (1986). Moreover, even though defendant's father told trial counsel on the second day of trial that someone had forged defendant's endorsement on a stolen check and cashed it using the driver's license stolen from defendant before the murder, trial counsel reasonably concluded that such information was immaterial not only to his client's chosen defense, but also to a determination of who killed the victim. Likewise, the fact that anonymous threatening letters and a package were received by defendant's relatives after the trial ended was not information available to trial counsel during trial and was immaterial to the defense. Despite defendant's theory that whoever stole the license killed Piedt, the trial court aptly found the evidence to be "totally irrelevant to anything that has anything to do with whether Mr. Martin was at Mr. Piedt's' on - Piedt's shop on the date of this - on the date of this - the incident," particularly in light of the "mountain of evidence" that the prosecutor had against defendant. The trial court likewise found, correctly we believe, that the anonymous threatening letters and package mailed to defendant's relatives after the trial were ambiguous, constituted inadmissible hearsay evidence, had "little probative value on the issue of who was in Mr. Piedt's shop," and that a different outcome would not have been obtained if

the mail had been admitted.

Further, given defendant's confession to his trial counsel, as well as the absence of any evidence to support the conclusion that the victim could not have been killed by a left-handed person, evidence that defendant was strictly left-handed would also not have been helpful on the issue of identity. An attorney is not ineffective for failing to present a defense for which there is no evidentiary support. Emerson, supra at 349.

We also conclude trial counsel was not ineffective for admitting, as part of the defense strategy, that defendant shot the victim and stipulating to the admission of the murder weapon. As previously noted, decisions regarding what defense to present and how to present it, including the introduction of evidence, are matters of trial strategy not to be second-guessed by a reviewing court with the benefit of hindsight. Barnett, supra at 338. According to the testimony of trial counsel, found to be credible by the trial court, defendant agreed to the defense strategy; the record indicates defendant never demonstrated any dissatisfaction with counsel's opening remarks or his representation during trial.

Defendant lastly argues defense counsel failed to assert sufficient reasons to support a motion to the court requiring the prosecution to grant immunity to his codefendant so that he could testify favorably to defendant's case. However, defendant's argument that the codefendant's testimony would have exonerated defendant is purely speculative. Moreover, because the agreed-upon strategy at trial was to admit that defendant killed the victim, but argue that the crime was something less than murder, it would have been illogical for defense counsel to argue the motion based on defendant's tenuous theory. In any event, the trial court could not force the prosecution to grant immunity to codefendant; such a decision is discretionary and rests with the prosecutor's office. People v Catanzarite, 211 Mich App 573, 580; 536 NW2d 570

(1990). Trial counsel is not required to advocate a meritless position. People v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000); People v Gist, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant's remaining arguments alleging ineffective assistance of counsel are without merit. Defendant has not demonstrated that his trial counsel's performance fell below an objective standard of reasonableness and that the ineffective representation so prejudiced him that he was deprived of a fair trial. Pickens, supra. We therefore conclude that the trial court did not abuse its discretion in daying defendant's motion for a new trial on the basis of ineffective assistance of counsel. Torres, supra.

II

Next, defendant argues the trial court had the authority to force the prosecution to grant codefendant immunity for his testimony and abused its discretion by failing to do so. We disagree.

A defendant is entitled to the benefit of immunity for witnesses only where prosecutorial misconduct results in the suppression of testimony favorable to a defendant. In People v Julian, 171 Mich App 153, 159-160, n 12; 429 NW2d 615 (1988), cited by defendant in support of his position, this Court relied on People v Iaconnelli, 112 Mich App 725; 317 NW2d 540 (1982), vacated in part on other grounds on rehearing, 116 Mich App 176; 321 NW2d 540 (1982), for the proposition that a defendant's due process rights could be violated if the refusal to grant immunity results in the suppression of testimony favorable to a defendant or where the immunity is necessary to obtain exculpatory testimony. Subsequently, however, in People v Schmidt, 183 Mich App 817, 832; 455 NW2d 430 (1990), this Court expressly rejected the rule in Iaconnelli which recognized inherent judicial authority to

grant use immunity where a defendant claims the prosecutor's failure to immunize a witness, in the absence of prosecutorial misconduct, deprives him of exculpatory evidence essential to his defense. Furthermore, in Catanzarite, supra at 580, this Court held that a "prosecutor has no duty to grant immunity so that the witness can testify for a defendant, and a defendant cannot compel a grant of immunity."

In light of the authority of the Schmidt and Catanzarit decisions, and in the absence of any discernible evidence on the record of prosecutorial misconduct, defendant's argument in this regard fails for lack of merit.

III

Finally, defendant argues the trial court abused its discretion by denying defendant's motion for new trial on the basis of newly discovered evidence, specifically, the fact that defendant's stolen driver's license was used to forge stolen checks while he was in jail, and the receipt of anonymous threatening letters and a package by defendant's relatives after he was convicted.

Under MCR 2.611(A)(1)(f), a new trial may be granted when the substantial rights of a party were materially affected and when there was "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. People v Miller (After Remand), 211 Mich App 30, 46-47; 535 NW2d 518 (1995). We review a trial court's decision regarding a motion for a new trial on the basis of newly discovered evidence for

an abuse of discretion. Id.

At the hearing on defendant's motion for new trial, the court found that the evidence in question was not newly discovered and was "totally irrelevant to anything that has anything to do with whether Mr. Martin was at Mr. Piedt's...shop" on the date of the murder. We find no abuse of discretion in this conclusion. The stolen driver's license and forged check were not material to defendant's case, since, as previously noted, the killer's identity was not an issue at trial. The evidence overwhelmingly implicated defendant. It would take a leap of logic to conclude, pursuant to defendant's theory, that the person who stole defendant's license actually killed the victim. Similarly, we are in agreement with the trial court that the anonymous letters and package received by defendant's relatives after the trial are ambiguous, constitute inadmissible hearsay evidence, and are not material to the issues in the case and fail to meet the criteria for the admission of newly discovered evidence. Miller, supra.

Affirmed.

/s/Richard Allen Griffin
/s/Peter D. O'Connell
/s/Kurtis T. Wilder

APPENDIX D

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE COUNTY OF BERRIEN

Docket No. 96-504416-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ALLAN GENE REEDER MARTIN, JR.,
Defendant-Appellant.

The following is a transcription of the trial court's ruling from the bench on Martin's motion for new trial. It is transcribed from the March 1, 1999 transcript, pages 143-156.

THE COURT: And the Court is ready to rule on the issues that I have before me.

First, on the issue of Judge Peterson's denial of immunity for Mr. Schram, the Court finds no error in Judge Peterson's ruling. I do want to state for the record also, to the extent that it may be unclear to the Appellate Court, that Judge Peterson retired from the bench as of January 1 of this year. He is no longer on the bench. Which is the reason why this case was assigned to this Court. It would ordinarily have gone back to Judge Peterson, but because he retired in the interim, the case came to this judge. And I just want to make the record clear for that.

The Court finds no error in Judge Peterson's denial of immunity for Mr. Schram. The defendant asserts a novel argument, which, in the Court's opinion, would require to pros - if granted, would require the prosecutor to grant codefendants immunity to testify in their co-defendants' trials in every case. I find no case or body of law that supports that proposition, number one; and secondly, at bottom, the defendant's argument here does not appear to be that Judge Peterson made an error in denying immunity on the basis that was asserted. The Court finds that the Trial Court properly based its ruling on the arguments made before it and that there was no error there. The Court finds that the argument

that Martin - that Mr. Schram was the only person besides the real killer who could testify about the position of Mr. Piedt's body when he was shot was factually inconsistent with the information that the defendant himself provided to Mr. Jancha, as well as inconsistent with what the Court will find in a matter of moments, the agreed upon defense that Mr. Jancha testified to earlier. In addition to that, there's nothing in this record to find that Mr. Schram would testify as defendant asserted. At the time of Mr. Schram's plea agreement concerning a plea to second-degree murder was in jeopardy in light of the fact that he had failed the polygraph examination, and there's nothing on this record that would lead one to believe that Mr. Schram was reasonably expected to testify, that—to exculpate Mister—Mr. Martin in these matters based on Mr. Schram's previous statements to the police.

Accordingly, the ground stated to Judge Peterson for—on the basis of the motion for immunity were simply not sufficient to justify an order of immunity in the case. I find no error in Judge Peterson's ruling, and accordingly, that portion of the defendant's motion is—or, request for a new trial based on that basis is denied.

Now, in addition to that, the defendant also alleges in his motion for a new trial that there is non-record newly discovered evidence and that Mr. Jancha's representation of Mr. Martin at trial was ineffective as a matter of law. MCR 6.431(B) states as follows:

> "On defendant's motion, the court may order a new trial on any grounds that would support appellate reversal of the conviction or because it believe that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made part of the record."

The decision whether to grant a motion for new trial rest[s] in the sound discretion of the Court. People v Mack, 112 Mich.App., 605, a 1981 case. For—The reasons that I'll fully exclate—exculpate on the record in a matter of moments. Each

of the defendants claims in its motion for a new trial, the Court finds wanting, and the Court denies in total the motion for a new trial.

First as to the motion of newly discovered evidence. People v Bass at 223 Mich. App. 241 at page 262, a 1999–1997 case states:

> "Before a new trial is warranted, the defendant must demonstrate that the evidence itself, not merely its materiality, is, one, newly discovered, two not cumulative, and three, probably would have caused a different result, and four, was not discoverable and or producible at trial with reasonable–reasonable diligence."

First, as it relates to the evidence of the cashed check. Mr. La–LaRatta did testify here today regarding that check. And the Court first finds that that information was available to counsel during the course of the trial and therefore, number one, is not newly discovered. Secondly, this issue, in the Court's opinion, is totally irrelevant to anything that has anything to do with whether Mr. Martin was at Mr. Piedt's on–Piedt's shop on the date of this–on the date of this–the incident. The Court finds that that is of no evidentiary value to determine whether someone else was at Mr. Piedt's shop on the day he was–that Mr. Piedt was killed. It is simply, in the Court's opinion, virtually, totally immaterial to anything having to do with the facts an evidence in this case, especially in light of and what the Court's opinion was a–And the Court has read the transcript of this trial–the mountain of evidence that was–that the prosecutor had against Mr. Martin and his involvement in this case. So, the forged check, in the Court's opinion, number one, was not newly discovered, and secondly, was immaterial and probably would not have been admitted in the trial by Judge Peterson in the first instance. But, in any event, even assuming we get to the notion that the–this issue has some probative value, the Court finds, in light of the–in light of the strong evidence against Mr. Martin presented by the prosecutor, that this certainly would not have

caused a different result of trial and I think is—would have been stricken as irrelevant to the—to the issues here. But, in any event, I've dwelled on that long enough.

The next item is a—the issue regarding the series—or, the multiple numbers of letters received by members of Mr. Martin's family. This is material that was not available at trial. But this argument of defendant is also—the defendant must fail. First, the letters are ambiguous in the first entrance, in the Court's opinion, have little probative value on the issue of who was in Mr. Piedt's shop, and therefore do not upset the balance required for a new trial in this matter; that is, whether a different result would occur on retrial.

In addition to that, after question—I questioned counsel this afternoon—or, earlier this afternoon regarding upon what theory these letters would be admissible in any retrial. I did not quite appropriately—Miss Hosley—I think quite appropriately Miss Hosley could not come up with an evidence rule which would allow the admissibility of these letters. These are—letters are hearsay, on the first order. They clearly would have been admitted into evidence. They're only relevant if they're admitted into evidence for the alleged truth of the matters asserted in the documents, and in the Court's opinion, no hearsay exception applies to these documents. The only, I guess, possible argument is, is that it is potentially admissible under 803.24, the new—the new so-called Catch-all Hearsay exception to the Hearsay Rule, but the rulings of the case law, at least in the federal law—in the Federal courts clearly show that a—indication of truck—trustworthiness must be found before the Court admits hearsay under the so-called Catch—Catch-all provision. And the Court finds that these documents do not have any indicia of trustworthiness in them whatsoever, they are anonymous, and, accordingly, in the Court's opinion, they are inadmissible hearsay. And for that reason, I don't believe they meet the task as set forth in the Bass case for newly discovered evidence that clearly would not have caused in the Court's opinion, even in—even if admitted, a different result at trial, given the strength of the prosecutor's

proofs at the – in – at the – in the course of the trial tried back in April of '97.

That leaves us with the final issue of ineffective assistance of counsel – of trial counsel, Paul Jancha. Mr. Jancha is a trial lawyer of 25 years['] experience. He testified for approximately an hour to an hour and a half here today about his representation of the defendant in this matter. Mr. Jancha, as I've already indicated, has been in the practice of law for two and a half decades. He has handled multiple numbers of homicide cases, whether by plea or trial. He is a – in the Court's opinion, based on his testimony, an accomplished criminal defense lawyer. And he, in the Court's opinion, did his job in the role of a defense lawyer. And I recognize that Pickens is the controlling case here; 446 Mich. 298. Which, at page 338, clearly sets for the Michigan test effective assistance. The Michigan Supreme Court in an opinion by Justice Riley indicates that, "a defendant's right to effective assistance of counsel must be so undermined that it justifies reversal [of an] otherwise valid conviction. In order to have that, a defendant must show that counsel's performance failed below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial."

Prejudice is defined at page 312 of the Pickens' opinion as follows:

> "To find prejudice, the Court must conclude that there is a reasonable probability that absent errors, the fact finder would have a reasonable doubt respecting guilt."

First, the Court finds that Mr. Jancha did not make any errors in this case. So to the extent that the phrase "absent the errors" is part of the analysis, the Court finds that what Mr. Jancha did was adopt a defense strategy for Mr. Martin consistent with the role of a defense counsel, which is set forth at page 325 of the Pitch – Pickens' opinion, which says, "The role of defense counsel is to choose the best defense for the defendant under the circumstances." Strickland, referencing the United States

Supreme Court case, permits a defense attorney to do so because, unless the attorney abandons the defense without a reasonable probability affecting the jury, the attorney may choose the best defense.

Now, obviously, I've heard conflicting testimony from Mr. Jancha and Mr. Martin regarding their communications while Mr. Jancha was representing Mr. Martin. I, frankly, do not often do this, but, first, as a matter—I must determine the credibility of the witnesses that appear before me. I find Mr. Martin's testimony to be totally incredible. I didn't believe—Other than his name, I did not believe anything that Mr. Martin said. It's clear to me that Mr. Martin is seeking to get a new trial based on a new theory alleging improprieties by his lawyer, including the subordination of perjury. And the Court cannot so find. I find Mr. Martin's testimony totally and completely incredible. I viewed him while he was testifying. I viewed him in light of the prior statements that he has made which are part of the record in this case. His testimony is totally and completely without factual basis in the Court's opinion.

Contrary, I find Mr. Jancha's testimony to be credible. Mr. Jancha, in the Court's opinion, based on the testimony that I hear, explored a number of possible defenses for Mr. Martin, including an intoxication—or, drug intoxication defense which he discussed with his associate Mr. Tyler. Ultimately, the decision was to not pursue that defense. That is again consistent with his role as a defense lawyer. And I cannot say that that was a bad decision. Even it [sic] was a bad decision, the rationale as stated by Mr. Jancha during the course of his testimony here today, was totally consistent with a lawyer seeking the best possible defense for his client. I find credible Mr. Jancha's testimony that Mr. Martin confessed to him after Mr. Martin failed the polygraph with Detective Gizzie of the Cass County Sheriff's Department. This was a pri—a private polygraph, for which the prosecutor would not have access. I find credible Mr. Jancha's testimony that after that polygraph, Mr. Martin confessed that he had been involved in

the – in the crime as set forth during the course of Mr. Jancha's testimony today. Mr. Jancha also described an ongoing discussion with Mr. Martin regarding the details of this crime. Mr. Martin's statement to Detective O'Brian was detailed and consistent with what the investigating officers found at the – at the scene; and that the details that were given by the defendant in Mr. Jancha's opinion clearly indicated that he was at the scene and had committed the offense. Left with that, Mr. Jancha's only – in his opinion, his only option was to seek to persuade the jury that the degree of homicide here was not first degree, but rather manslaughter. I cannot at all fault that strategy as pointed out by Mr. Jancha. The defendant's confessions here were detailed and, in Mr. Jancha's opinion, could not have been contrived. The Court agrees. The defendant went with the police and retrieved the gun and retrieved the bullets. I found Mr. Jancha's testimony credible in that regard. Mr. Martin's explanation for that in the Court's opinion is totally incredible. The fact that he confessed to this crime because of some pressure from a gang, in the Court's opinion, is totally incredible.

I'd also find as a matter of fact that Mr. Jancha discussed with Mr. Martin the nature of the strategy that they intended to propose, and, discussed within the fact that Mr. Martin was going to have to testify. Now, Mr. Mar – I recognize that – and I believe that Mr. Martin senior was not involved in that discussion. But, number one, I don't believe there's any legal requirement that even though Mr. Martin, Senior was paying the – paying the defense bill here in defense of his son, there's no legal requirement that Mr. Jancha tell Mr. Martin, Senior about the nature of whether the defendant was going to testify or not, and, frankly, I think – well, just below the surface here, Mr. Jancha didn't convey that information to Mr. Martin, Senior because Mr. Martin, Junior asked his – Mr. Jancha not to tell his parents that he had – he had committed the crime. And I think that's a totally plausible explanation as to why Mister – I believe Mr. Martin, Senior when he says he wasn't told. I believe that. And I believe his testimony in that regard.

But I think there's a very plausible explanation for why that is. And in part, that is because Mr. Martin Junior did not want Mr. Jancha to convey to Mr. Martin, Senior the fact that after the polygraph in this case, his son had confessed.

In—And I just want to comment for the record also that in terms—to the extent that the Court must make a determination that the representation of the defendant deprives the defendant of a fair trial. The defendant got a fair trial here. There was a very significant, strong test—evidence against this defendant, including the defendant's own statement, which was detailed by Detective O'Brian in his testimony which starts, for relevant parts, on page 173 and goes through 179. And then we have the defendant's own testimony placing him at the scene.

As I said before, I don't—I don't believe for one second that Mr. Jancha suborned perjury in this matter. I believe that the strategy was discussed with the defendant. The defendant testified consistent with—if—at the transcript—I don't have the pages, but the defendant testified that Mr. Piedt was—thought he was calling the police—they thought Mr. Piedt was calling the police, that he was frighten[ed], and that he shot Mr. Piedt because he thought he was calling the police. That provided the best opportunity, in the Court's opinion, for Mr. Martin to get out from under the first-degree murder charges in this case; and indeed, the jury came back with second-degree murder on the premeditation count, but they found the requisite—apparently the jury beyond a reasonable doubt found the requisite intent for—for first-degree murder as it relates to—as it relates to felony murder.

A—In what—in the Court's opinion, is a—is a—it's a related issue, but one that I—in the Court's opinion, does not have much weight, if any, is whether Mr. Martin was left-or right-handed. As far as I can tell, and I haven't been pointed to anything in the record that makes that significant, the fact is, is that the gun barrel was a certain distance away from Mr. Piedt and I don't think there's anything—and I asked counsel whether there was anything in the record to support the

assertion that somehow that made a difference. I'm not satisfied, based on what I've heard and based on my review of the record, that that did make a difference. And accordingly, the Court gives no weight to the notion that Mr. Piedt had to be killed by a person who was right-handed as opposed to Mr. Martin, who asserts that he was left-handed. Indeed, it's clear from the tape that Mr. Martin does indeed right [sic] with his left hand; but again, in light of the—in light of the very substantial testimony that was against this defendant, the Court finds no error in the representation of this—of Mr. Jancha by Mr. Martin.

The defendant has not overcome the presumption that the challenge at trial strategy of Mr. Jancha [sic] was sound. That's the Tommolino case, at T—it's T-o-m-m-o-l-i-n-o, 187 Mich. App., page 14 at page 17, a 1991 case. Not having found any deficiency, the defendant has not met his burden of proof on a motion for new trial. Even if there were some deficiencies in the representation of Mr. Jancha of Mr. Martin, the Court finds that that—any of those deficiencies were not prejudicial to the defendant's case. And accordingly, for all the reasons stated, the motion for a new trial is denied.

APPENDIX E

The following is a transcription of the anonymous letters sent to Martin's family members after his conviction. The letters were scrawled and the grammar and spelling were poor. Therefore, transcription cannot perfectly reflect the content of the letters. In addition, had the original copies been available, reading and transcribing the letters would have been more effective.

Letter #1: "I TOLE YOU I GET ALLAN AND I [W]ONT TO GOIN GET THE REST OF YOU I SHOT HIM ONE[Q] BUT I

DID GT COUTH I RUN HIS MOM CRAZY NO I GON TO GT HIS DAD I KILLED THAT MAN ALLAN DID BUT HE TAKING BOLAM FOR IT AND YOU NEXT THIS BE REAL NEXT LOOK OUT"

Letter #2: "ALLAN I SORRY I HADE TO LIE BUT THE POLICE SAID IF I DID THEY PUT ME IN JAIL MAKE SAID HE HAVE HIS BOY AFTER ME I NO ALLAN DID KILL THAT MAN THE BOY THAT GOT HIS DRIVERS LICENSE KILLED HIM AND ROTE THIM CHECK ON HIM I NO I CANT SAY MY MAME BUT I SORRY"

Letter #3: "Peggy I NO YOU LIKE FINE OUT HOW I AM BUT IM TO SMART THE POLICE CANT CHESE ME YOU ARE NEXT IN LINE I GOT RID OF ALLAN HIS DAD IS NEXT THEN HIS GRANDPA AND GRANDMA ALLAN DID KILLE THAT MAN ME AND MACK DID WE ROB THISM BEFORE AND DIG COUTE AND AUNT GO TO THIS TIME WE TAKE ALLAN CAR KEYES SO HE COULD GO HOME SO WE COULD HIM IN TRUBLE BUT WE RUN HIS MA CRAZY AND WE GOING TO RUN YOU CRAZY I NO PEGGY AND SHANDAL YOUR TO GIRLS

SO BE ON THE LOOK OUT

I STILL GOT ALLAN DRIVER LICENSE AND I CASH THAT CHECK AND DID GET COUTE HA HA

SEE YOU SOON"

Letter #4: "Hi YOU NO THAT PEARL HAND GUN THAT THAY SAID ALLEN WONT SO BAD WELL THAT GUN WAS MICHAEL DAD GUN AND HE WONT IT TO GIVE IT BACK TO DAD IN PLACE OF THE ONE HE [indiscernible] STOLED FROM HIS DAD HE SOLD THAT GUN IF A BOY IN BENTON HARBOR AND HIS SISTER GOT COTE WITH IT MICHAEL SAID ALLAN WENT ALLEN WAS WITH US

THAT BOY THAT LOOK LIKE ALLAN THAT GOT HIS DRIVER LICENSE AND CASH THAT CHECK [indiscernible] BE OUT SOON BUT ALLAN NEVER GET OUT MICHEL AND ME AND ANOTHER BOY AND ONE MORE GOT A [indiscernible] MACK DID THIS TIME WE TO SMART TO BE COTE WE TOLD ALLEN IT HE TOLD ON US WE KILL HIS DAD AND HIS AUNT AND GRANDPA AND GRANDMA WE STILL GOING TO KILL YOU ALL ALLAN GRANDMA HAS SEE ME AND ALLAN I COME TO BURING YOU BOFE AND KILL ALLEN DAD SOME NIGHT WHEN HE COME HOME

BOY WE SMART